

1 HONORABLE ROBERT S. LASNIK  
2  
3  
4  
5  
6  
7  
8  
9  
10

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

11 BRUCE KEITHLY and DONOVAN  
12 LEE, Individually and on Behalf of all  
other Similarly Situated,

13 Interim Lead Plaintiffs,  
14 vs.

15 INTELIUS INC., a Delaware  
16 Corporation; and INTELIUS SALES,  
LLC, A Nevada Limited Liability  
Company,

17 Defendant and  
18 Third Party Plaintiffs,  
vs.

19 ADAPTIVE MARKETING, LLC, a  
20 Delaware Limited Liability Company,

21 Third Party Defendant.

Case No. C09-1485-RSL

DEFENDANTS' RESPONSE TO  
PLAINTIFFS' PROPOSED SURREPLY  
TO DEFENDANTS' REPLY  
SUPPORTING MOTION FOR  
SUMMARY JUDGMENT DISMISSING  
BRUCE KEITHLY'S CONSUMER  
PROTECTION ACT CLAIM

Noted for: June 10, 2011

22  
23  
24  
25  
DEFS' RESPONSE TO PLTF'S PROPOSED  
SURREPLY RE MOTION FOR SUMMARY  
JUDGMENT DISMISSING KEITHLY'S CPA  
CLAIM

LAW OFFICES  
DANIELSON HARRIGAN LEYII & TOLLEFSON LLP  
999 THIRD AVENUE, SUITE 4400  
SEATTLE, WASHINGTON 98104  
TEL, (206) 623-1700 FAX, (206) 623-8717

1 Plaintiffs' proposed Surreply asks the Court to strike two portions of Intelius' reply  
 2 brief, in which Intelius pointed out the factual and legal fallacies in Plaintiffs' intended means  
 3 of proving the causation element of their Consumer Protection Act claim for the class  
 4 members. Surreply at 1-3.

5 First, Plaintiffs object that Intelius should have confined itself to addressing proof of  
 6 causation for Keithly individually, rather than for the class as a whole, and that Intelius'  
 7 argument prematurely responded to Plaintiffs' pending motion for class certification. Surreply  
 8 at 2. Plaintiffs argue that Intelius improperly raised its responsive argument for the first time  
 9 in its reply brief on this summary judgment motion. Surreply at 2.

10 Plaintiffs' motion to strike should be denied. This portion of Intelius' Reply directly  
 11 responds to pages 16-17 of Plaintiffs' opposition brief on this motion, where Plaintiffs  
 12 explicitly presented and argued the theory by which Plaintiffs intend to establish causation for  
 13 Keithly and for the class:

14 The Washington Supreme Court has repeatedly affirmed that reliance is not an element  
 15 of a CPA claim, but rather is one type of proof that could be used to establish  
 16 causation. . . . Here, Plaintiffs, acting for the Class, can establish the causal link  
 17 between Intelius's actions and the Class's injuries using records showing that Class  
members did not enable the member-enabled benefits for the subscription services.  
 18 Plaintiffs will also rely on payment records, statistical evidence drawn from data  
 19 showing how customers navigated the Intelius site (collected by Intelius), and Intelius's  
 20 and Adaptive's sales, fulfillment, and customer service records. Individual evidence  
 21 (*i.e.*, testimony) of reliance will not be offered a proof.

22 Plaintiffs' Opp. at 16-17 (citation omitted; emphasis added). Plaintiffs stated that Keithly's  
 23 causation proof would parallel that of the class. The opposition properly addressed this issue.  
 24 *Eberle v. City of Anaheim*, 901 F.2d 814, 817-18 (9th Cir. 1990) (party's reply brief may  
 25 address an issue raised in the opposing party's opening brief).

26  
 27  
 28  
 29  
 30  
 31  
 32  
 33  
 34  
 35  
 36  
 37  
 38  
 39  
 40  
 41  
 42  
 43  
 44  
 45  
 46  
 47  
 48  
 49  
 50  
 51  
 52  
 53  
 54  
 55  
 56  
 57  
 58  
 59  
 60  
 61  
 62  
 63  
 64  
 65  
 66  
 67  
 68  
 69  
 70  
 71  
 72  
 73  
 74  
 75  
 76  
 77  
 78  
 79  
 80  
 81  
 82  
 83  
 84  
 85  
 86  
 87  
 88  
 89  
 90  
 91  
 92  
 93  
 94  
 95  
 96  
 97  
 98  
 99  
 100  
 101  
 102  
 103  
 104  
 105  
 106  
 107  
 108  
 109  
 110  
 111  
 112  
 113  
 114  
 115  
 116  
 117  
 118  
 119  
 120  
 121  
 122  
 123  
 124  
 125  
 126  
 127  
 128  
 129  
 130  
 131  
 132  
 133  
 134  
 135  
 136  
 137  
 138  
 139  
 140  
 141  
 142  
 143  
 144  
 145  
 146  
 147  
 148  
 149  
 150  
 151  
 152  
 153  
 154  
 155  
 156  
 157  
 158  
 159  
 160  
 161  
 162  
 163  
 164  
 165  
 166  
 167  
 168  
 169  
 170  
 171  
 172  
 173  
 174  
 175  
 176  
 177  
 178  
 179  
 180  
 181  
 182  
 183  
 184  
 185  
 186  
 187  
 188  
 189  
 190  
 191  
 192  
 193  
 194  
 195  
 196  
 197  
 198  
 199  
 200  
 201  
 202  
 203  
 204  
 205  
 206  
 207  
 208  
 209  
 210  
 211  
 212  
 213  
 214  
 215  
 216  
 217  
 218  
 219  
 220  
 221  
 222  
 223  
 224  
 225  
 226  
 227  
 228  
 229  
 230  
 231  
 232  
 233  
 234  
 235  
 236  
 237  
 238  
 239  
 240  
 241  
 242  
 243  
 244  
 245  
 246  
 247  
 248  
 249  
 250  
 251  
 252  
 253  
 254  
 255  
 256  
 257  
 258  
 259  
 260  
 261  
 262  
 263  
 264  
 265  
 266  
 267  
 268  
 269  
 270  
 271  
 272  
 273  
 274  
 275  
 276  
 277  
 278  
 279  
 280  
 281  
 282  
 283  
 284  
 285  
 286  
 287  
 288  
 289  
 290  
 291  
 292  
 293  
 294  
 295  
 296  
 297  
 298  
 299  
 300  
 301  
 302  
 303  
 304  
 305  
 306  
 307  
 308  
 309  
 310  
 311  
 312  
 313  
 314  
 315  
 316  
 317  
 318  
 319  
 320  
 321  
 322  
 323  
 324  
 325  
 326  
 327  
 328  
 329  
 330  
 331  
 332  
 333  
 334  
 335  
 336  
 337  
 338  
 339  
 340  
 341  
 342  
 343  
 344  
 345  
 346  
 347  
 348  
 349  
 350  
 351  
 352  
 353  
 354  
 355  
 356  
 357  
 358  
 359  
 360  
 361  
 362  
 363  
 364  
 365  
 366  
 367  
 368  
 369  
 370  
 371  
 372  
 373  
 374  
 375  
 376  
 377  
 378  
 379  
 380  
 381  
 382  
 383  
 384  
 385  
 386  
 387  
 388  
 389  
 390  
 391  
 392  
 393  
 394  
 395  
 396  
 397  
 398  
 399  
 400  
 401  
 402  
 403  
 404  
 405  
 406  
 407  
 408  
 409  
 410  
 411  
 412  
 413  
 414  
 415  
 416  
 417  
 418  
 419  
 420  
 421  
 422  
 423  
 424  
 425  
 426  
 427  
 428  
 429  
 430  
 431  
 432  
 433  
 434  
 435  
 436  
 437  
 438  
 439  
 440  
 441  
 442  
 443  
 444  
 445  
 446  
 447  
 448  
 449  
 450  
 451  
 452  
 453  
 454  
 455  
 456  
 457  
 458  
 459  
 460  
 461  
 462  
 463  
 464  
 465  
 466  
 467  
 468  
 469  
 470  
 471  
 472  
 473  
 474  
 475  
 476  
 477  
 478  
 479  
 480  
 481  
 482  
 483  
 484  
 485  
 486  
 487  
 488  
 489  
 490  
 491  
 492  
 493  
 494  
 495  
 496  
 497  
 498  
 499  
 500  
 501  
 502  
 503  
 504  
 505  
 506  
 507  
 508  
 509  
 510  
 511  
 512  
 513  
 514  
 515  
 516  
 517  
 518  
 519  
 520  
 521  
 522  
 523  
 524  
 525  
 526  
 527  
 528  
 529  
 530  
 531  
 532  
 533  
 534  
 535  
 536  
 537  
 538  
 539  
 540  
 541  
 542  
 543  
 544  
 545  
 546  
 547  
 548  
 549  
 550  
 551  
 552  
 553  
 554  
 555  
 556  
 557  
 558  
 559  
 560  
 561  
 562  
 563  
 564  
 565  
 566  
 567  
 568  
 569  
 570  
 571  
 572  
 573  
 574  
 575  
 576  
 577  
 578  
 579  
 580  
 581  
 582  
 583  
 584  
 585  
 586  
 587  
 588  
 589  
 590  
 591  
 592  
 593  
 594  
 595  
 596  
 597  
 598  
 599  
 600  
 601  
 602  
 603  
 604  
 605  
 606  
 607  
 608  
 609  
 610  
 611  
 612  
 613  
 614  
 615  
 616  
 617  
 618  
 619  
 620  
 621  
 622  
 623  
 624  
 625  
 626  
 627  
 628  
 629  
 630  
 631  
 632  
 633  
 634  
 635  
 636  
 637  
 638  
 639  
 640  
 641  
 642  
 643  
 644  
 645  
 646  
 647  
 648  
 649  
 650  
 651  
 652  
 653  
 654  
 655  
 656  
 657  
 658  
 659  
 660  
 661  
 662  
 663  
 664  
 665  
 666  
 667  
 668  
 669  
 670  
 671  
 672  
 673  
 674  
 675  
 676  
 677  
 678  
 679  
 680  
 681  
 682  
 683  
 684  
 685  
 686  
 687  
 688  
 689  
 690  
 691  
 692  
 693  
 694  
 695  
 696  
 697  
 698  
 699  
 700  
 701  
 702  
 703  
 704  
 705  
 706  
 707  
 708  
 709  
 710  
 711  
 712  
 713  
 714  
 715  
 716  
 717  
 718  
 719  
 720  
 721  
 722  
 723  
 724  
 725  
 726  
 727  
 728  
 729  
 730  
 731  
 732  
 733  
 734  
 735  
 736  
 737  
 738  
 739  
 740  
 741  
 742  
 743  
 744  
 745  
 746  
 747  
 748  
 749  
 750  
 751  
 752  
 753  
 754  
 755  
 756  
 757  
 758  
 759  
 760  
 761  
 762  
 763  
 764  
 765  
 766  
 767  
 768  
 769  
 770  
 771  
 772  
 773  
 774  
 775  
 776  
 777  
 778  
 779  
 780  
 781  
 782  
 783  
 784  
 785  
 786  
 787  
 788  
 789  
 790  
 791  
 792  
 793  
 794  
 795  
 796  
 797  
 798  
 799  
 800  
 801  
 802  
 803  
 804  
 805  
 806  
 807  
 808  
 809  
 810  
 811  
 812  
 813  
 814  
 815  
 816  
 817  
 818  
 819  
 820  
 821  
 822  
 823  
 824  
 825  
 826  
 827  
 828  
 829  
 830  
 831  
 832  
 833  
 834  
 835  
 836  
 837  
 838  
 839  
 840  
 841  
 842  
 843  
 844  
 845  
 846  
 847  
 848  
 849  
 850  
 851  
 852  
 853  
 854  
 855  
 856  
 857  
 858  
 859  
 860  
 861  
 862  
 863  
 864  
 865  
 866  
 867  
 868  
 869  
 870  
 871  
 872  
 873  
 874  
 875  
 876  
 877  
 878  
 879  
 880  
 881  
 882  
 883  
 884  
 885  
 886  
 887  
 888  
 889  
 890  
 891  
 892  
 893  
 894  
 895  
 896  
 897  
 898  
 899  
 900  
 901  
 902  
 903  
 904  
 905  
 906  
 907  
 908  
 909  
 910  
 911  
 912  
 913  
 914  
 915  
 916  
 917  
 918  
 919  
 920  
 921  
 922  
 923  
 924  
 925  
 926  
 927  
 928  
 929  
 930  
 931  
 932  
 933  
 934  
 935  
 936  
 937  
 938  
 939  
 940  
 941  
 942  
 943  
 944  
 945  
 946  
 947  
 948  
 949  
 950  
 951  
 952  
 953  
 954  
 955  
 956  
 957  
 958  
 959  
 960  
 961  
 962  
 963  
 964  
 965  
 966  
 967  
 968  
 969  
 970  
 971  
 972  
 973  
 974  
 975  
 976  
 977  
 978  
 979  
 980  
 981  
 982  
 983  
 984  
 985  
 986  
 987  
 988  
 989  
 990  
 991  
 992  
 993  
 994  
 995  
 996  
 997  
 998  
 999  
 1000  
 1001  
 1002  
 1003  
 1004  
 1005  
 1006  
 1007  
 1008  
 1009  
 10010  
 10011  
 10012  
 10013  
 10014  
 10015  
 10016  
 10017  
 10018  
 10019  
 10020  
 10021  
 10022  
 10023  
 10024  
 10025  
 10026  
 10027  
 10028  
 10029  
 10030  
 10031  
 10032  
 10033  
 10034  
 10035  
 10036  
 10037  
 10038  
 10039  
 10040  
 10041  
 10042  
 10043  
 10044  
 10045  
 10046  
 10047  
 10048  
 10049  
 10050  
 10051  
 10052  
 10053  
 10054  
 10055  
 10056  
 10057  
 10058  
 10059  
 10060  
 10061  
 10062  
 10063  
 10064  
 10065  
 10066  
 10067  
 10068  
 10069  
 10070  
 10071  
 10072  
 10073  
 10074  
 10075  
 10076  
 10077  
 10078  
 10079  
 10080  
 10081  
 10082  
 10083  
 10084  
 10085  
 10086  
 10087  
 10088  
 10089  
 10090  
 10091  
 10092  
 10093  
 10094  
 10095  
 10096  
 10097  
 10098  
 10099  
 100100  
 100101  
 100102  
 100103  
 100104  
 100105  
 100106  
 100107  
 100108  
 100109  
 100110  
 100111  
 100112  
 100113  
 100114  
 100115  
 100116  
 100117  
 100118  
 100119  
 100120  
 100121  
 100122  
 100123  
 100124  
 100125  
 100126  
 100127  
 100128  
 100129  
 100130  
 100131  
 100132  
 100133  
 100134  
 100135  
 100136  
 100137  
 100138  
 100139  
 100140  
 100141  
 100142  
 100143  
 100144  
 100145  
 100146  
 100147  
 100148  
 100149  
 100150  
 100151  
 100152  
 100153  
 100154  
 100155  
 100156  
 100157  
 100158  
 100159  
 100160  
 100161  
 100162  
 100163  
 100164  
 100165  
 100166  
 100167  
 100168  
 100169  
 100170  
 100171  
 100172  
 100173  
 100174  
 100175  
 100176  
 100177  
 100178  
 100179  
 100180  
 100181  
 100182  
 100183  
 100184  
 100185  
 100186  
 100187  
 100188  
 100189  
 100190  
 100191  
 100192  
 100193  
 100194  
 100195  
 100196  
 100197  
 100198  
 100199  
 100200  
 100201  
 100202  
 100203  
 100204  
 100205  
 100206  
 100207  
 100208  
 100209  
 100210  
 100211  
 100212  
 100213  
 100214  
 100215  
 100216  
 100217  
 100218  
 100219  
 100220  
 100221  
 100222  
 100223  
 100224  
 100225  
 100226  
 100227  
 100228  
 100229  
 100230  
 100231  
 100232  
 100233  
 100234  
 100235  
 100236  
 100237  
 100238  
 100239  
 100240  
 100241  
 100242  
 100243  
 100244  
 100245  
 100246  
 100247  
 100248  
 100249  
 100250  
 100251  
 100252  
 100253  
 100254  
 100255  
 100256  
 100257  
 100258  
 100259  
 100260  
 100261  
 100262  
 100263  
 100264  
 100265  
 100266  
 100267  
 100268  
 100269  
 100270  
 100271  
 100272  
 100273  
 100274  
 100275  
 100276  
 100277  
 100278  
 100279  
 100280  
 100281  
 100282  
 100283  
 100284  
 100285  
 100286  
 100287  
 100288  
 100289  
 100290  
 100291  
 100292  
 100293  
 100294  
 100295  
 100296  
 100297  
 100298  
 100299  
 100300  
 100301  
 100302  
 100303  
 100304  
 100305  
 100306  
 100307  
 100308  
 100309  
 100310  
 100311  
 100312  
 100313  
 100314  
 100315  
 100316  
 100317  
 100318  
 100319  
 100320  
 100321  
 100322  
 100323  
 100324  
 100325  
 100326  
 100327  
 100328  
 100329  
 100330  
 100331  
 100332  
 100333  
 100334  
 100335  
 100336  
 100337  
 100338  
 100339  
 100340  
 100341  
 100342  
 100343  
 100344  
 100345  
 100346  
 100347  
 100348  
 100349  
 100350  
 100351  
 100352  
 100353  
 100354  
 100355  
 100356  
 100357  
 100358  
 100359  
 100360  
 100361  
 100362  
 100363  
 100364  
 100365  
 100366  
 100367  
 100368  
 100369  
 100370  
 100371  
 100372  
 100373  
 100374  
 100375  
 100376  
 100377  
 100378  
 100379  
 100380  
 100381  
 100382

Second, Plaintiffs argue that Intelius' Reply brief improperly raises for the first time the point that Keithly "knew that he was enrolling in a Free Trial of IDP." Surreply at 3, paraphrasing Intelius Reply at 5-6, 11-12. Again, Plaintiffs' opposition brief made that same assertion—in fact, Plaintiffs' Surreply cites their own opposition brief. Surreply at 3, citing Pl. Opp. at 20. Plaintiffs' opposition brief stated:

Mr. Keithly testified that, in his experience as a consumer, free trials are truly free, and that when a free trial ends, the consumer has to take affirmative steps to enroll in a service. . . . Mr. Keithly explained . . . : “[O]ther than seeing that [Identity Protect] didn’t cost anything and that it was a trial, not a purchase, I just went on my way. . . . It’s a trial, it doesn’t cost anything, go onto the next page. . . .”

Pl. Opp. at 20-21. The Opposition addressed this assertion, which directly contrasts with Plaintiffs' theory of causation stated in that same brief—that all the Plaintiffs were unaware that any second product – *i.e.*, Identity Protect – was involved in their transactions at all:

Plaintiffs' theory is that they were tricked into paying for something that they did not want or receive, and did not use. It is reasonable to assume that a customer did not intend to purchase a product like IDP if he never took steps to make sure the product would actually work. . . . Indeed, Intelius knows that Mr. Keithly never used IDP.

Opp. at 18.

Plaintiffs' motions to strike should be denied.

DATED this 22<sup>nd</sup> day of June, 2011.

DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

By s/Arthur W. Harrigan, Jr.

Arthur W. Harrigan, Jr., WSBA #1751  
Christopher Wion, WSBA #33207  
Attorneys for Defendants Intelius Inc.  
and Intelius Sales Company, LLC

**DEFS' RESPONSE TO PLTF'S PROPOSED  
SURREPLY RE MOTION FOR SUMMARY  
JUDGMENT DISMISSING KEITHLY'S CPA  
CLAIM - 2**

**LAW OFFICES  
DANIELSON HARRIGAN LEYH & TOLLEFSON LLP**  
999 THIRD AVENUE, SUITE 4400  
SEATTLE, WASHINGTON 98104  
TEL. (206) 623-1700 FAX. (206) 623-8717

## **CERTIFICATE OF SERVICE**

I hereby certify that on June 22, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Mark A. Griffin, Karin B. Swope, Harry Williams IV and Keller Rohrback L.L.P.; Andrew N. Friedman, Victoria S. Nugent, Whitney R. Case and Cohen Milstein Sellers & Toll P.L.L.C.; Cori Gordon Moore, Thomas L. Boeder and Perkins Coie LLP

and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: \_\_\_\_\_

  
Yvette Chambers

**DEFS' RESPONSE TO PLTF'S PROPOSED  
SURREPLY RE MOTION FOR SUMMARY  
JUDGMENT DISMISSING KEITHLY'S CPA  
CLAIM - 3**

LAW OFFICES  
**DANIELSON HARRIGAN LEYH & TOLLEFSON LLP**  
999 THIRD AVENUE, SUITE 4400  
SEATTLE, WASHINGTON 98104  
TEL. (206) 623-1700 FAX. (206) 623-8717